REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 30 OF 2018

JOHN ANDREW NYAMBU.....APPELANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the conviction and sentence from the original Criminal Case No. 695 of 2015 in a Judgment delivered on 31.8.2017 by Hon. Dr. Julie Oseko – Chief Magistrate).

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the state

The Appellant in person

J U D G M E N T

The appellant herein was arraigned before the Chief Magistrate Court at Malindi where he was tried, convicted and sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8 (1) as read with Sub-Section 8 (3) of the Sexual Offences Act. The brief particulars contribution of the offence were that on the 15th October, 2015 at [Particulars Withheld] Village, the appellant intentionally and unlawfully caused his penis to penetrate the genitalia of the complainant namely **JPM.** female child aged 14 years.

The case entails understanding on the burden of proof, mechanics of evidence adduction and the factors that play out to give the trier of facts to rule in favor of the prosecution to convict and sentence the appellant.

As matters of Procedure and Evidence Act stated out, the prosecution summoned three (3) witnesses to precisely persuade the trial Court in respect of the standard of proof in terms of the elements of the offence beyond reasonable doubt.

The burden to prove existence of facts began with the version given by the complainant **(PW1) JPM**. She acknowledged being a student at [Particulars Withheld] Primary School aged 13 years old as at 15th October, 2015. That on the material day while walking home with other students, they encountered the appellant. **(PW1)** testified that as the rest of her friends scattered, unfortunately the appellant caught up with her while armed with a panga. He held his hand, dragged her to the forest. It was at that scene she was undressed, coupled with threats of likely violence to be unleashed if she makes attempts to resist or scream. The appellant also showed the complainant that he was armed with two knives which he could use against her in any event. In the midst of those threats, **(PW1)** told the Court that appellant prepared the ground in which sexual intercourse took effect. Further **(PW1)** stated that upon the appellant accomplishing his mission, they parted company with a warning that she should not disclose to anyone about the incident. However, according to **(PW1)** notwithstanding the caution, on arrival at home she did inform her grandmother, who in turn succeeded in reporting the incident to Lango Baya Police Station.

(PW2) – SC a minor aged 16 years gave unsworn evidence on the incident of 15.10.2015 when **(PW1)** allegedly was defiled. It was **(PW2)** evidence that on the material day he was walking home with **(PW1)** when they met the appellant on the road. Further, **(PW2)** testified that the appellant went after the complainant pushing her towards the forest while armed with a panga. He was later to receive information from **(PW1)** that the appellant went ahead to have carnal knowledge with her without regard to any resistance she put forward.

Apart from **(PW1)** and **(PW2)** evidence, the prosecution also adduced evidence from **(PW3) – (IM).** His evidence touched on information received that **(PW1)** had been abducted and taken into the forest by the appellant. It did not take long before the complainant appeared at home. It is clear from **(PW3)** evidence that **(PW1)** narrated to him the ordeal of sexual intercourse she went through with the appellant. By virtue of that report, **(PW3)** took further steps to inform the Chief of the area, and the police. For this reason, the complainant was referred to the hospital for a medical examination.

On the 16.10.2015, **PC Robert Kinuthia, (PW4)** testified that he was instructed by the O.C.S. to investigate the defilement incident involving the complainant **(PW1). (PW3)** told the Court that acting on such information, he went ahead to record statements and later effected an arrest against the appellant to face trial for the offence of defilement.

(PW4) – Moses Rimba a clinical officer attached to Malindi gave evidence of having medically examined **(PW1).** Thus from **(PW4)** observations, the complainant had suffered bruises to the labia minora, bruises to the upper part of the vaginal wall and ruptured hymen. He produced the P3 Form as exhibit and Age Assessment report in support of the two elements on penetration and the age of the complainant.

As indicated in the record, appellant was placed on his defence. He denied the allegation of defiling the complainant. That the only reason he found himself in Court is because of an arrest for an offence he knows nothing about.

On appeal, the appellant wholly relied on his written submissions. The gist of the submissions centered mainly on the aspect that contradictions and discrepancies on the part of the complainant **(PW1)** were so grave to warrant the trial Court to have discarded it altogether. The appellant further contended that the defects and contradictions were so material as to impact negatively on the prosecution case. Further, appellant submitted that the medical evidence was also at variance with the complainant's testimony as to the date and time when the offence occurred and the entries in the P3 Form.

On the probative value and reliability of the evidence, the appellant cited the following authorities **State of Panjab v Jagir Singh {1974} 35 CC 277, David Ojeabuo v Federal Republic of Nigeria {2014} NWLR, Albanus Mwasia Mutua v R CR Appeal No. 120 of 2004, Arthur Mshila Manga v R {2016} eKLR, Ben Mwangi v R {2006} eKLR.**

As far as sentence is concerned, appellant submitted that the order by the Learned trial Magistrate is in contravention with Section 216 and 329 of the Criminal Procedure Code. He also invited the Court to adopt the principles in **Francis Muruatetu v R {2017} eKLR** and the Court of Appeal dicta in **Eliud Waweru v R CR Appeal No. 102 of 2016.** The appellant, then contended that the appeals Court should vary or set aside the sentence imposed by the trial Court.

Resolution

This is a first appeal and the duty of this Court is to determine whether the trial Court properly evaluated the evidence so as to come to the finding of guilty and conviction relating to the appellant unlawful acts of defiling the victim. **(See R v Hassan Bin Said {1942} 9 EACA 62).**

I have carefully considered the appellant's complaint in light of the evidence with respect to the charge of defilement. The most serious complaint of the appellant was that the prosecution witnesses gave contradictory and inconsistent evidence which failed the threshold test of a case proven beyond reasonable doubt. The Court has considered the complaint in line with the testimony of each witnesses who testified on behalf of the state. On scrutiny and re-examination, this was an offence which was committed in circumstances **(PW1)** gave graphic details of the appellant's involvement. This was also followed by the direct testimony of **(PW2)** who also became the victim of the appellant threats to defilement.

Similarly, on the material day, **(PW3)** heard the children taking of the incident that appellant had dragged **(PW1)** to the forest. In his evidence **(PW3)** reported the matter to the police to initiate investigations. The complainant on returning from the scene was escorted to Malindi Sub-County hospital for a medical examination. The doctor's evidence was that he examined the complainant and did establish the hymen was broken, with fresh bruises on the labia minora and tenderness on touch. The P3 Form was completed and produced in evidence. The appellant defence was a denial of the charge.

This Court has reviewed the entire evidence against the backdrop of the submissions challenging the findings of the trial Magistrate. It is clear that the complainant's evidence whatever state of distress she was managed to demonstrate consistently. The surrounding circumstances in which she was defiled by the appellant. By the Learned trial Magistrate placing reliance in her testimony, the record shows evidence of corroboration from **(PW2).** Having been in the company of **(PW1)** at the time she was dragged to the forest by the appellant it adds to the credibility and truthfulness of the complainant's evidence. Corroboration could also be found in the doctor's evidence on his findings when he examined the complainant. The scratch marks and bruises to the labia minora and broken hymen fresh indicators corroborates the complainant's evidence.

In the case of **Uganda v Wilson Simbwa CR Appeal No. 37 of 1995** – The Court held:

> ***"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or written, the class of offences for which corroboration is required."***

The value of corroboration is rooted in the legal standard of proof beyond reasonable doubt that must be met by the prosecution in order to secure a conviction.

From the record, it is undoubtedly clear that the prosecution proved the element of sexual act of defilement against the complainant. There is no material placed before this Court by the appellant to show that the complainant or her witnesses contradicted themselves to render the findings on conviction made by the Learned trial Magistrate fatal.

I have also considered the evidence on proof of age of the complainant, the ingredient as specified in the charge sheet was proved by the medical assessment report admitted in evidence as an exhibit pursuant to Section 77 of the Evidence Act with regard to the element of identification the prosecution adduced evidence from **(PW1)** and **(PW2)** respectively. The test laid down in **R v Turnbull {1976} 3 ALL**

ER 551 and **Abdallah Bin Wendo v R C 20 EACA 166** emphasis the obligation on the part of the trial Court to assess and analyze the evidence of identification with meticulous care.

On my part, I have also subjected the evidence to a fresh scrutiny and I am satisfied that the prevailing circumstances were favourable for a qualitative identification of the appellant. There were no features in which the witnesses could be disturbed from the positive identification of the appellant. In my Judgment, the identification evidence in this case was of high quality for the very reason that the appellant was a well known person to the complainant and **(PW2)** respectively. What comes out clearly in this appeal, is that the appellant was properly implicated and there were no contradictions between **(PW1), (PW2), (PW3), (PW4)** and **(PW5)** to occasion an error on the face of the record or mistake to justify interference with the Judgment of the trial Court.

On sentence, the trial Court imposed punishment of twenty (20) years imprisonment. According to the principle in **Ogolla S/o Owuor v R {1954} EACA 270:**

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

For this Court to interfere with the sentencing, appellant has the duty to demonstrate the factual and legal question required to vary or set aside the sentence. The cumulative effect of the appellant submissions fails the test outlined in **Ogolla case (supra).** In my considered view the appellant was properly sentenced.

As a consequence the appeal is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF SEPTEMBER, 2021.

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R NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state

2. The Appellant